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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CISCO SYSTEMS, INC.,

19 Plaintiff,

20 v.

21 ARISTA NETWORKS, INC.,

22 Defendant.
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Case No. 5:14-cv-05344-BLF (NC)

**DEFENDANT ARISTA'S OBJECTIONS
TO PLAINTIFF CISCO'S 11/28/16 TRIAL
EXHIBITS AND DEMONSTRATIVES**

Dept.: Courtroom 3 – 5th Floor
Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

1 Arista objects to the following Nov. 28 trial exhibits and demonstratives.

2 **Scope of Testimony for Christine Bakan, including all exhibits disclosed:** With respect
 3 to Cisco witness Christine Bakan, the Court has previously ruled *in limine* that Ms. Bakan's
 4 testimony should be limited to the Rule 30(b)(6) topics on which she was designated. Nov. 8,
 5 2016 MIL Order at 11-12. Based on Cisco's disclosure of exhibits that Ms. Bakan will sponsor, it
 6 appears that Cisco intends to elicit testimony that goes beyond the limitations that the Court
 7 imposed in its *in limine* ruling. Accordingly, Arista objects to any testimony from Ms. Bakan and
 8 Cisco's use of any documents therewith inconsistent with the Court's Order.

9 Cisco designated Ms. Bakan to testify on Arista's Rule 30(b)(6) Topics 94-97. *See* Ex. C
 10 attached hereto (relating to analyses commissioned by Cisco on modes, prompts, or hierarchies,
 11 and studies on the value of these CLI components).

12 The majority of exhibits Cisco has disclosed for Ms. Bakan relate to Cisco CCIE and
 13 CCNA certifications. *See* Exs. 743; 744; 745; 757; 771; 774; 972. Ms. Bakan was not designated
 14 to testify on the certifications, and she ***admitted*** she didn't "know exactly all the details of the
 15 certification program, but she believe[s], just based on [her] knowledge, that the certification
 16 programs involve becoming experts in the CLI." Ex. B (Bakan Depo. Tr.) at 44:2-15; *see*
 17 *generally* 40:13-45:1. Arista thus objects to Ms. Bakan giving any trial testimony about Cisco
 18 certifications.

19 **Cisco's Ex. 633:** Portions of Exhibit 633 are barred by this Court's Order re Motions *in*
 20 *Limine* and by FRE 402, 403 and 602. Exhibit 633 contains explicit references to ITC
 21 investigation. *See, e.g.*, Ex. 633 at 14, 29-31, 38, 42, 48, 131-132. This Court granted Arista's
 22 motion to exclude references to the ITC investigations. *See* Nov. 8, 2016 MIL Order at 7-8.
 23 These portions should be redacted. Likewise, Cisco should not introduce statements concerning
 24 other litigation by or against Arista. *See, e.g.* Ex. 533 at 5, 25, 29-35, 47, 50, 78, 85, 130-32.
 25 These portions of Exhibit 633 are also irrelevant to the limited scope of topics on which Ms.
 26 Bakan can testify, and are therefore unduly prejudicial and inadmissible. *See* FRE 402 and 403.

27 **Cisco's Ex. 611 and 3673:** Arista objects to Exs. 611 and 3673 because they are manuals
 28 Cisco never deposited with the Copyright Office and never registered. The exhibits are examples

1 of un-asserted, unregistered works that Arista moved to exclude *in limine*.

2 **Cisco's Ex. 742:** Cisco's 10-K constitutes inadmissible hearsay and should also be
3 excluded under FRE 402 and 603. The statements contained therein were made by the party
4 offering the document and fall squarely within Rule 801's definition of hearsay. They have no
5 apparent relevance under Rule 402 to the topics on which the witness has been designated to
6 discuss. Nor does Ms. Bakan arguably have any personal knowledge of the matters contained
7 therein, which relate to Cisco's disclosures to the S.E.C., justifying exclusion under Rule 602.

8 **Cisco's Exs. 757 and 771:** Stuart Biggs' blog entry (Ex. 757) and the Wendell Odom
9 blog post (Ex. 771) are hearsay under FRE 801.

10 **Cisco's Exs. 3472, 4307, and 5152:** The Cisco PowerPoint presentations (Exs. 3472,
11 4307, and 5152) are hearsay under FRE 802. During meet and confer, Cisco claimed these
12 presentations qualify as business records. They do not satisfy any of the requirements specified
13 under FRE 803(6)(a), (b), and (c).

14 **Cisco's Ex. 4790:** Ex. 4790 is not admissible under FRE 1006 for four reasons. *First*,
15 Cisco did not, as FRE 1006 requires, make the underlying exhibits available for inspection. The
16 materials underlying a proper summary exhibit must be made available to the opposing party for
17 examination at a reasonable time and place (without any request from the opposing party).
18 *United States v. Bray*, 139 F.3d 1104, 1109 (6th Cir. 1998); Rutter Group Prac. Guide Fed. Civ.
19 Trials & Ev. Ch. 8C-C. Failure to make the underlying materials available renders the summary
20 inadmissible. *Conoco Inc. v. Department of Energy*, 99 F3d 387, 393 (Fed. Cir. 1996); *United*
21 *States v. Miller*, 771 F2d 1219m 1238 (9th Cir. 1985). Here, Cisco has not produced the
22 underlying exhibits to Arista. Cisco's response to Arista's Interrogatory No. 31 was prepared
23 after fact discovery was closed, and Cisco made no production of the documents cited therein,
24 such as the documents listed in the right-most column. Cisco's corporate representative
25 confirmed that Cisco's production was insufficient, and Cisco's counsel stated on the record that
26 Cisco would not supplement it. *See* Ex. A (Lougheed Depo. Tr.) at 501:17–504:1. Therefore,
27 Cisco's summary exhibit based on those documents is inadmissible.

28 *Second*, Cisco cannot establish that the underlying documents are admissible; a litigation-

1 created document that compiles multitudes of e-mails and other hearsay material is not a proper
 2 summary exhibit. *See, e.g., Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th
 3 Cir. 2004). Even if any e-mails could be considered under the business records exception, the
 4 Court must, at a minimum, undertake a particularized analysis of the emails, which is impossible
 5 here. *See generally Rogers v. Oregon Trail Elec. Consumers Co-op., Inc.*, No. 3:10-CV-1337-
 6 AC, 2012 WL 1635127, at *9 (D. Or. May 8, 2012).

7 *Third*, FRE 1006 requires that the preparer of the summary exhibit be subject to cross
 8 examination. Mr. Loughheed did not prepare the summary exhibit at issue; he testified that he
 9 spoke to the two engineers who prepared the summaries—one for only 10 to 15 minutes, and the
 10 other for some unspecified period of time. *See Ex. A* at 471:1-19; 519:9-22. Because Arista is
 11 not being given the opportunity to cross examine those who prepared the summary, it must be
 12 excluded. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir.
 13 1985); *United States v. Green*, 428 F.3d 1131, 1134-1135 (8th Cir. 2005).

14 *Fourth*, the exhibit is replete with assertions of who authored a particular helpdesc phrase
 15 even though there are no documents cited as support; these assertions are hearsay at best and are
 16 plainly prejudicial. In addition, the column headings are prejudicial, as they purport to identify
 17 “authors” and “originators”: conclusions only the jury can draw. At a minimum those headings
 18 must be redacted.

19 **Cisco’s Ex. 4789:** Exhibit 4789 suffers from the same deficiencies as Exhibit 4790. The
 20 document has many incomplete entries. For example, it claims the underlying document for the
 21 “area nssa translate type7 always” command is “Cisco IOS 12.2(15)T,” which is not an
 22 underlying document. The exhibit includes many e-mails, and Cisco cannot establish, on an
 23 individualized basis, whether those e-mails are business records under the hearsay exception; it is
 24 extremely unlikely that they can qualify for the exception at all. And, regardless, exhibit 4789 is
 25 another litigation-created document, not a summary exhibit that would be kept in the ordinary
 26 course of business. *See Rogers*, 2012 WL 1635127, at *9. Exhibit 4789, like 4790, is an attempt
 27 to circumvent the hearsay rule en masse with an interrogatory response; it should not be admitted.
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Dated: November 25, 2016

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